United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2111

To be argued by
MARK A. SPEISER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2111

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

VICTOR DANENZA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2111

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR DANENZA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor Danenza appeals from orders of July 1, 1975 and September 4, 1975 * of the United States District Court for the Southern District of New York, per the Honorable Robert L. Carter, United States District Judge, holding him Danenza in civil contempt of court. Judge Carter's orders were based on his finding that pursuant to 28 U.S.C. § 1783 Danenza had been properly served abroad with a grand jury subpoena duces tecum in accordance with applicable Italian law and Rule

* A hearing was held before Judge Carter on July 1, 1975. It was only when appellant ordered a copy of that proceeding that it was discovered that no official record had been made. Upon being advised of the pending appeal, Judge Carter filed an opinion on September 4, 1975 setting forth his findings of fact and conclusions of law. That opinion is attached hereto as an addendum.

4i of the Federal Rules of Civil Procedure, that Danenza had personal knowledge of the contents of the subpoena, and that Danenza had offered no explanation for his failure to comply with the terms of the subpoena.*

Statement of Facts

On May 1, 1975, pursuant to Rule 17(e)(2) of the Federal Rules of Criminal Procedure** and Title 28, United States Code, Section 1783,*** and premised on a

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* The subpoena in question sought books and records required by the grand jury in connection with an investigation which culminated in the filing of this District of Indictment 75 Cr. 628 on June 25, 1975. That indictment, in 38 counts, charged Danenza and five other defendants, in two separate conspiracies, with violation of federal securities laws and the federal mail fraud statute in connection with the purchase and sale of securities. It further charged Danenza individually with evading the income tax owed by a corporation he secretly controlled by causing the corporation to fail to file a tax return for 1972 with the Internal Revenue Service. The Honorable Whitman Knapp, United States District Judge, issued a bench warrant for Danenza's arrest on June 25, 1975. The warrant has yet to be executed as Danenza remains a fugitive from justice.

** "A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783."

*** 28 U.S.C. § 1783 provides:

> (a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or pro-

[Footnote continued on following page]

written application of the Government, the Honorable Lawrence W. Pierce, United States District Judge for the Southern District of New York, ordered the issuance and service of a grand jury subpoena duces tecum on Victor Danenza, a United States citizen then residing in Milan, Italy. The pertinent part of Judge Pierce's order, which had been drafted by the Government, reads as follows:

> ". . . that the attached subpoena be served directly on said Victor Danenza, by the appropriate official of the American Consulate in Rome, Italy or through the appropriate Italian official in accordance with the requirements of Italian law.
>
> It is further ordered that VICTOR DANENZA be tendered the fare necessary to procure a one way ticket between Milano, Italy and New York, New York, together with $36 representing one day's witness fee."

Judge Pierce's order together with the subpoena were forwarded on May 7, 1975 through the Department of

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ceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

State to the American Consulate office in Milan, Italy. The American Consul then delivered the subpoena to the District Attorney's Office Of The Republic of Milan for service on Danenza.

Serra Livio, The Adjutant Judicial Official of the Court of Appeals of Milan, Notification Office, stated in an affidavit that on May 22, 1975, he left the subpoena with Ermes Pilati, concierge of the hotel where Danenza was residing, since Danenza was absent from the hotel at the time Livio attempted personally to serve him. According to Livio's affidavit, on May 24, 1975, he notified Danenza by registered mail that he had left the subpoena with Pilati (A-12).*

Livio's service of the subpoena was in compliance with Article 139 of the Italian Civil Procedure Code which provides that where the person to be served, as well as any relative residing with him, are absent from their residence, service may properly be made by delivering a copy of the subpoena to the concierge of the building where the person to be served resides if, in addition, the concierge signs for the subpoena and the party thus served is notified by registered letter that the subpoena was left with the concierge (A-9). Livio's affidavit states that both these requirements were complied with (A-12).

By letter dated May 21, 1975, Frederick H. Hassett, American Consul at the American Consulate in Milan, advised Danenza that when the latter notified the Consulate of the date on which he intended to depart Milan for New York in order to respond to the subpoena he would be provided with a "one way air ticket from Milan to New York and with $36 cash per diem" (A-15).

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* References to pages of appellant Danenza's Appendix are abbreviated "A".

In an affidavit sworn to on May 30, 1975, Luciano Mangiafico, Vice-Consul of the American Embassy in Milan, stated he received a telephone call from Danenza on May 27, 1975. During that conversation Danenza advised Mangiafico that the subpoena had not been served on him directly but rather had been left with the concierge who had placed the subpoena in his mailbox. After advising Danenza that this procedure conformed with Italian law, Mangiafico offered to serve Danenza with another copy of the subpoena if he would appear at the Consulate. Danenza declined (A-14).

Danenza failed to appear before the grand jury on May 28, 1975 as directed by the subpoena. He has never offered any excuse for his failure to comply with the mandate of the subpoena.

Upon application of the Government, pursuant to Section 1784 of Title 28, United States Code,* the Honorable

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*28 U.S.C. § 1784 provides:

(a) The court of the United States which has issued a subpoena served in a foreign country may order the person who has failed to appear or who has failed to produce a document or other thing as directed therein to show cause before it at a designated time why he should not be punished for contempt.

(b) The court, in the order to show cause, may direct that any of the person's property within the United States be levied upon or seized, in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against him pursuant to subsection (d) of this section if adequate security, in such amount as the court may direct in the order, be given for any damage that he might suffer should he not be found in contempt. Security under this subsection may not be required of the United States.

(c) A copy of the order to show cause shall be served on the person in accordance with section 1783(b) of his title.

[Footnote continued on following page]

Edmund L. Palmieri, United States District Judge for the Southern District of New York, ordered Danenza to appear before the United States District Court on July 1, 1975, to show cause why he should not be held in contempt for his failure to appear before the grand jury on May 28, 1975.*

On July 1, 1975, Danenza did not personally appear at the hearing before Judge Carter. He was represented by counsel, Mr. Robert S. Fink, Esq., who argued that since the subpoena had not been served directly on Danenza as ordered by Judge Pierce, the District Court lacked jurisdiction to hold Danenza in contempt. Danenza offered no affidavits or depositions and offered no other documentary or testimonial explanation for his failure to appear. The Government, in contrast, produced the affidavits of Livio and Mangiafico, a copy of the letter sent by Hassett to Danenza and a copy and translation of Article 139 of the Italian Civil Procedure Code. In view of the foregoing, Judge Carter then denied Danenza's request for a hearing to determine whether service of the subpoena complied with Judge Pierce's order and whether Danenza had knowledge of that subpoena. Instead he ordered Danenza in contempt based upon his finding that the subpoena had been served in compliance with Italian law

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(d) On the return day of the order to show cause or any later day to which the hearing may be continued, proof shall be taken. If the person is found in contempt, the court, notwithstanding any limitation upon its power generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceedings be satisfied by a sale of the property levied upon or seized, conducted upon the notice required and in the manner provided for sales upon execution.

* Judge Palmieri's show cause order required by its terms that it be served personally on Kostelanetz, Ritholz & Mulderig, Danenza's attorneys, and on Danenza by mailing to him a copy of the same at his Milan residence (A-3).

and that Danenza had personal knowledge of its existence and contents. Judge Carter, did not, however, impose any punishment on Danenza as a result of his order of contempt.

ARGUMENT

POINT I

The District Court correctly found that Danenza had been properly served with a grand jury subpoena duces tecum and it therefore had jurisdiction to find him in civil contempt.

Danenza advances a twofold argument in support of his claim that the District Court lacked jurisdiction to hold him in contempt. First, he argues, Judge Pierce's order of May 1, 1975 required that he be served "directly" with the subpoena and that since he was not, he was under no obligation to obey its command to appear before the grand jury on May 28, 1975. Second, he asserts, the attempted service of the subpoena was defective because the person who served it was not the same person who tendered to him the necessary travel and attendance expenses as assertedly required by 28 U.S.C. § 1783(b). Both arguments are in error. They misconceive the proper intendment of Judge Pierce's original order and the requirements of law.

While the language of the original order of May 1, 1975 is not entirely free of ambiguity, in providing for an alternative means of service—"through the appropriate Italian official in accordance with the requirements of Italian Law"—Judge Pierce clearly did not intend to limit such service solely to that made "directly" and personally on Danenza. To do so would have substantially undermined the very purposes to be served by providing for

such an alternative means of service. Judge Carter, in holding Danenza in contempt, correctly declined to find any such limitation.

Furthermore, the order signed by Judge Pierce had been drafted and submitted to him by the Government as part of its papers in support of its application for the issuance of the subpoena at issue here. As the author of that somewhat inartfully drafted order, the Government could hardly have intended to impose on itself requirements regarding service of process in a foreign country, pursuant to 28 U.S.C. § 1783, more stringent than those imposed by the law itself. This is significant because, as Judge Carter found and as we set forth more fully herein, the substituted service effected in the instant case was fully in accordance with the requirements of Italian law and hence, also, with those of 28 U.S.C. § 1783(b). Accordingly, the service effected fully complied with Judge Pierce's order. Moreover, even assuming *arguendo* that Judge Pierce's order could properly be read to impose more stringent requirements than Rule 4(i)(1) itself, the Government's compliance with the latter is, itself, enough to validate the service of the subpoena at issue.

Section 1783(b) provides that a subpoena authorized under Section 1783(a) is to be served in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.* Rule 4(i)(1) of the Federal Rules of Civil Pro-

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* Prior to 1964, Section 1783(b) required personal service of the subpoena by the American Consul in the foreign country. In 1964 this section was amended to permit service under Rule 4, Fed.R.Civ.P. The more flexible methods for service contained in Rule 4 are now sufficient. Accordingly, personal and direct service is no longer required and various other forms of service, including that effected here, are now proper and efficacious if actual notice is given and due process standards are met.

cedure, added in 1963, lists five alternative methods for effecting service of a party in a foreign country. As the Advisory Committee Notes to Rule 4i(1) indicate, compliance with any one of the different methods set forth therein will suffice:

> "Under subdivisions (e) and (o) when authority to make foreign service is found in a Federal Statute . . ., it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces further flexibility by permitting the foreign service and return thereof in any of a number of other alternative ways that are also declared to be sufficient."

Judge Pierce's order incorporates two of the five alternatives provided by Rule 4(i)(1): subparagraph (A), which permits service in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction (". . . through the appropriate Italian official in accordance with the requirements of Italian Law"); and subparagraph (E) which permits the District Court to fashion its own order for service (". . . directly . . . on said Victor Danenza by the appropriate official of the American Consulate in Rome, Italy . . .").

The Advisory Committee Notes expressly provide that subparagraph (A) of Rule 4(i) is designed to accommodate the policies and procedures of the foreign country where service is sought. In the language of the Advisory Committee,

> "Subparagraph (A) of Paragraph (1) permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that

> is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad."

However, if service is to be effected in accordance with the law of the foreign country, the rule explicitly states that the method of service employed must be reasonably calculated to give actual notice to the party to be served. At the hearing Denenza raised no claim that Article 139 of the Italian Civil Procedure Code failed to conform with traditional American due process standards. Indeed, as Judge Carter found, Danenza did not controvert any of the facts as represented by the Government.

Thus, it is clear that Serra Livio, the Italian process server effected valid substituted service on Danenza, in accordance with the requirements of Italian law. Article 139 expressly permits service on the concierge of the building where the person sought to be served resides, where the circumstances are as they were here. It is equally clear, and Judge Carter so found, that the affidavit of Luciano Mangiafico affirmatively demonstrated that Danenza had actual notice of the subpoena. Danenza's statement to Mangiafico that the subpoena had been left with the concierge, who he further acknowledged placed it in his mailbox, conclusively demonstrates that fact. Indeed, Danenza was even advised by Mangiafico that such service was legal under Italian Law. Given the foregoing uncontroverted facts, Judge Carter was clearly correct in finding (a) that the subpoena had been served in compliance with Italian law that service therefore complied with the requirements of Rule 4(i) and hence those of 28 U.S.C. § 1783(b); and (b) that Danenza had personal knowledge of the contents of the subpoena. Accordingly, the intent manifested in Judge Pierce's original order as properly discerned, was fully effectuated.

Moreover, even if Judge Pierce's order could properly be said to have imposed the requirement that Danenza be served personally and directly, as well as in accordance with the requirements of Italian law, the Government's compliance with Rule 4(i) itself would suffice to validate service here. Section 1783(b) of Title 28, United States Code, calls for service to be made pursuant to Rule 4(i) and service in the instant case has been accomplished in the fashion therein prescribed. Rule 4(e) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service in a manner stated in this rule."

Since service here was made "under the circumstances and in the manner prescribed by" 28 U.S.C. § 1783(b), it was entirely proper, notwithstanding that Judge Pierce's order arguably imposed certain additional and more stringent requirements with which the Government did not comply. The authority for the subpoena issued here was founded in the first instance on a statute with whose terms the Government fully complied. *Cf. Levin* v. *Ruby Trading Corp.*, 248 F. Supp. 537 (S.D.N.Y. 1965).

Danenza's further claim that the service of process here is defective since the person serving the subpoena did not tender him his expenses is also without merit. Although Section 1783(b) states that the same person serving the subpoena should likewise tender to the party being served the fees required to return to this country, the fact remains that Frederick Hassett, the American Counsul in

Milan did, by letter* dated May, 1975,** offer to provide Danenza with a one way air ticket and $36 cash per diem.

As the Supreme Court pointed out in *Blackmer* v. *United States*, 284 U.S. 421, 439 (1931), which construed the pre-1964 version of Section 1783(b) requiring the American Consul personally to serve the subpoena, counsul when serving subpoenas exercises no sovereign power but acts as mere governmental messenger:

> "In selecting the counsel for the service of the subpoena, the Congress merely prescribed a method deemed to assure the desired result but in no sense essential."

Here the counsul did tender the fees.

Moreover, since Section 1783(b) now provides for various forms of substituted service in accordance with the provisions of Rule 4(i) of the Federal Rules of Civil Procedure, that section's requirement that "[t]he person serving the subpoena shall tender to the person to whom the subpoena is addressed his [required witness fees]", should be construed even more liberally than before.***

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* This Court in any event, has rejected the claim that the failure of the process server personally to serve the prospective witness with the required fees would render defective otherwise valid service. *United States* v. *De Simone*, 267 F.2d 741 (2d Cir. 1959), *vacated as moot*, 361 U.S. 125 (1959) (per curiam). *De Simone* held that the statement to the prospective witness by the United States Marshal serving the subpoena that the witness fees were available in his office, some ten minutes away, constituted a sufficient tender of the fees.

** It is important to note that this letter was sent six days prior to the conversation which ensued between Danenza and Luciano Mangiafico as reported in Mangiafico's affidavit, and one day prior to that on which the Italian process server left the subpoena with the concierge at Danenza's residence.

*** In *Nola Electric Company* v. *Reilly*, 93 F. Supp. 164 (S.D. N.Y. 1948), the court held that the particular individual or official authorized to effect service of process is a detail that relates to the conduct of the court's business and does not affect substantial rights.

POINT II

The contempt hearing before Judge Carter fully protected Danenza's due process rights.

Danenza asserts that the contempt proceedings were conducted in such a fashion as to deprive him of his due process rights. Danenza contends that the procedural safeguards provided by Rule 42(b) of the Federal Rules of Criminal Procedure for all nonsummary contempt hearings were not complied with. Furthermore, he asserts, since the contempt citation might ultimately lead to his imprisonment, the Government was required to produce more substantial evidence than the affidavits of Livio and Mangiafico and the letter of Hassett. The contentions are in error. The due process requirements of Rule 42(b) were fully adhered to and the evidence offered by the Government at the hearing amply supported Judge Carter's finding that Danenza's failure to comply with the subpoena was inexcusable.

There is at the outset a substantial question whether Danenza has standing to challenge the District Court's order of contempt. Danenza asserts, and we agree, that the District Court is empowered to impose a term of imprisonment premised on a finding of civil contempt pursuant to 28 U.S.C. § 1784(b).* Danenza, however, failed to appear personally at the contempt hearing and is at the present time a fugitive from justice in connection with Indictment 75 Cr. 628, filed in this District on June 25, 1975 (see, *supra*, p. 2 n*.) In connection with

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* But see *In re Thompson*, 213 F. Supp. 372, 377 (S.D.N.Y.), *rev'd on other grounds sub. nom United States* v. *Thompson*, 319 F.2d 665 (2d Cir. 1963), where the District Court, in construing the earlier version of the instant statute, held that punishment for civil contempt pursuant to Section 1784(b) is limited solely to the imposition of a fine.

the contempt hearing, the District Court was thus deprived of jurisdiction of Danenza's person and therefore could not compel his confinement. Such wilful absence may well deprive Danenza of standing in this Court to challenge the order of the lower court. See *In re Thompson, supra*, 213 F. Supp. at 377. Additionally, the Government refrained from requesting that the District Court impose a fine on Danenza because of what it perceived to be the virtual impossibility of collecting any such fine—given the apparent absence of most if not all of Danenza's assets from this country. Under such circumstances, Danenza may well be without the jurisdiction of this Court unless and until he deposits assets with the District Court out of which a fine can be satisfied if the order of contempt is affirmed. *See Eisler* v. *United States*, 338 U.S. 189 (1949); *Stern* v. *United States*, 249 F.2d 720 (2d Cir. 1957), *cert. denied*, 357 U.S. 919 (1958).

Danenza's assertion that the District Court denied him the procedural regularities provided for by Rule 42(b) is misguided. In *In re Sadin*, 509 F.2d 1252 (2d Cir. 1975), this Court correctly pointed out that Rule 42(b) only requires that the defendant be accorded reasonable notice of the proceeding, a reasonable time for preparation of his defense, and notice of the essential facts constituting the contempt charges. The order to show cause and the accompanying affidavits of the Government prosecutor, Livio, and Mangiafico mailed to Danenza and his attorney on June 11, 1975 provided Danenza with more than reasonable time to prepare for the July 1, 1975 proceeding and afforded him a clear indication of the Government's allegations. Danenza failed to object at the hearing to the sufficiency of the notice provided him and raises no question in this regard on appeal.

In *Blackmer*, *supra* at 440, the Supreme Court held that due process requirements are satisfied by suitable notice and an adequate opportunity to appear and be heard. Danenza's asserted denial of due process rests not with any failure to satisfy Rule 42(b) but rather and exclusively with his claim that Judge Carter may not find him in contempt solely on the basis of the affidavits and letter introduced at the hearing by the Government.

The issue to be resolved at the contempt proceeding was whether Danenza's non-compliance with the subpoena was wilful and demonstrated a "contumacious disregard of the authority of the court." *Thompson*, *supra* at 670; *accord*, *United States* v. *Lansky*, 496 F.2d 1063 (5th Cir. 1974). Judge Carter's determination that the Government's evidence proved Danenza had been served with the subpoena in compliance with Judge Pierce's order placed the burden on Danenza to show that he in good faith attempted to comply with its terms. *United States* v. *Johnson*, 247 F.2d 5 (2d Cir. 1957), *cert. denied*, 355 U.S. 867 (1957). Danenza clearly failed to discharge that burden.

Danenza's defense that he was under no obligation to honor the subpoena because it had not been directly served on him was not supported by a scintilla of evidence. No affidavits or depositions were introduced to corroborate his position. Danenza's attempt to shift the focus of the inquiry to the failure of the Government to have Livio, Mangiafico and Hassett present for cross-examination is unavailing where the submitted affidavits and letter, which were uncontroverted, are themselves clear and convincing proof of contempt.

Danenza's timely receipt of the Government's affidavits, attached as exhibits to the order to show cause, sufficiently apprised Danenza of the Government's intention to utilize these documents at the contempt hearing.

Under Rule 27 of the Federal Rules of Civil Procedure, Danenza was entitled to petition the District Court in advance of the July 1, 1975 proceeding for permission to take depositions from Livio, Mangiafico and Hassett for use at the hearing. In both *Lansky* and *Thompson*, the defendants availed themselves of this opportunity. Danenza's choice not to do so here is unfortunate but inexcusable and may not now be remedied by his claim that the Government was required to have these persons in attendance for cross-examination and that its asserted failure to do so was a denial of due process. To require the Government to accede to Danenza's request would not only cause inordinate inconvenience to these persons but also lead to substantial and unnecessary expense. These factors could easily have been avoided by Danenza's deposing the individuals in question in Italy. Furthermore, it is ironic that Danenza's counsel would assert as error the absence of these witnesses whose addresses were known to him at the time of the hearing when the whereabouts of his own client, for purposes of deposition and more importantly extradition, are unknown to the Government.

The Government's utilization of affidavits to prove service of the subpoena and Danenza's personal knowledge of its contents failed to transgress the relevant due process standards. Affidavits alone may constitute a basis upon which a court may resolve the factual issues present in a contempt proceeding. *National Labor Relations Board* v. *Red River Lumber Co.*, 109 F.2d 157, 162 (9th Cir. 1940); *National Labor Relations Board* v. *Arcade Sunshine Co., Inc.*, 122 F.2d 964 (D.C. Cir. 1941), *cert. denied*, 313 U.S. 567 1940). That conclusion is applicable here *a fortiori* since Danenza failed entirely to offer any evidence tending to establish that his failure to comply with the subpoena was non-wilful. Given the absence of any evidence controverting the Government's showing, Judge Carter's finding that Danenza's failure to comply with the subpoena was inexcusable was entirely correct.

CONCLUSION

The District Court's order of contempt should be affirmed.

Respectfully submitted,

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Of Counsel.

ADDENDUM

Opinion of Honorable Robert L. Carter, U.S.D.J., Dated September 3, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M 11-188

UNITED STATES OF AMERICA

—against—

VICTOR DANENZA,

Defendant.

APPEARANCES:

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Attorneys for Defendant

CARTER, District Judge

I understand that through inadvertence no record was made of the hearing held before me on July 1, 1975, and that the matter is now on appeal. Accordingly, I am setting forth the bases upon which judgment of contempt was entered.

Opinion of Honorable Robert L. Carter, U.S.D.J., Dated September 3, 1975

Pursuant to papers filed by the government and statement of counsel at the hearing, the following representations were undisputed: the defendant, Victor Danenza is a United States citizen residing in Milan, Italy, at the Residence Principessa Clotilde, Corso di porta Nuova 52. This court (Pierce, *J.*) had ordered a grand jury subpoena duces tecum served on defendant by an appropriate official of the American Consulate in Rome or through an appropriate Italian official in accord with the requirements of Italian Law. On May 22, 1975, Serra Livio, the Adjutant Judicial Official, served the subpoena on Ermes Pilate, the concierge where defendant resided. Mr. Livio's affidavit sets forth that in the defendant's absence, he gave the subpoena to the concierge who assumed responsibility for delivering the subpoena to defendant and advised the defendant of the service by registered letter on May 24, 1975 (Exhibit C). This appears to be in accord with Article 139 of the Italian Civil Procedure Code (Exhibit B).

In a letter dated May 21, 1975 (Exhibit E) Frederick H. Hassett, American Consul in Milan, advised the defendant that he would be provided with a one-way air-fare ticket from Milan to New York and $36 per diem. On May 27, 1975, Luciano Mangiafico, Vice Consul in Milan, had a telephone conversation with the defendant in which the latter acknowledged receipt of the subpoena but stated that he would not honor it because it was not served on him personally, and he refused to appear at the American Consulate so that the subpoena could be personally served on him. (Exhibit D).

The defendant did not appear before the grand jury on May 28 and made no representation explaining his failure to appear. On June 11, 1975, this court (Pal-

mieri, J.) ordered defendant to appear in Room 506 on July 1, 1975, or show cause why he should not be held in contempt for failing to appear before the grand jury.

On July 1, 1975, the defendant appeared through counsel. No affidavit or other testimonial explanation of his failure to appear was presented. None of the facts as represented by the government was controverted. Nor was any issue made as to whether Exhibit B was a correct statement of Italian law, or whether Mr. Livio's action was in proper compliance therewith. Counsel relied solely on defendant's right not to honor the subpoena because it had not been personally served on him.

The facts as I find them show beyond dispute that the subpoena was served in compliance with Italian Law and therefore meets the requirement of Rule (4i)(1), Fed. R.Civ.P. The Advisory Committee Notes to Rule (4i)(1) indicate specifically that the purpose of this rule was to allow service of process by methods which conform to the laws of the country where service is made. In any event, the defendant had personal knowledge of the contents of the subpoena. Accordingly, his failure to comply with the court's order of June 11, 1975, is inexcusable and he is adjudged in contempt of court.

SO ORDERED.

Dated: New York, New York
September 3, 1975

/s/ .....
ROBERT L. CARTER
U.S.D.J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK A. SPEISER being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22nd day of September he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Mr. Robert Fink, Esq.
Kostelanetz, Ritholz & Mulderig
80 Pine Street
New York, New York 10005

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Mark A. Speiser

MARK A. SPEISER
Special Attorney
United States Department of Justice

Sworn to before me this

22nd day of September, 1975

Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-460917
Qualified in Kings County
Commission Expires March 30, 1977